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No. 10-170

Supreme Court, U.S.
FILED
SEP 3 - 2010
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In The
Supreme Court of the United States

OFFICER BRIAN MARTIN, OFFICER JASON BROWN, OFFICER SCOTT STRAUB, SERGEANT TIM SELVIA, SERGEANT KEVIN HUNTER, LIEUTENANT KEVIN ZELT, DEPUTY CHIEF MARTIN A. BENDER, and DEPUTY CHIEF DOUGLAS A. LUCKER, each in his individual capacity,

Petitioners,

v.

ESTATE OF RUDY ESCOBEDO (Deceased), RAQUEL HANIC, Personal Representative of Estate,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should the Court grant a petition for certiorari that admits that the Seventh Circuit properly articulated the qualified immunity standard, but challenges the court's application of that standard in affirming, on interlocutory appeal, the district court's denial of qualified immunity?

2. Should the Court grant a petition for certiorari to provide general guidelines on the constitutional limits on the use of tear gas and flash-bang grenades in the absence of a division among the circuit courts of appeals on the appropriate standards?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 11

I. The Seventh Circuit appropriately applied this Court's precedent in affirming the denial of qualified immunity 12

II. The Court does not need to grant certiorari to discuss the general constitutional limits on police use of specific non-lethal weapons in the absence of a circuit split, and this case would be a poor vehicle to address the constitutional limits on the use of tear gas and flash-bang grenades 21

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Allen v. Muskogee County, 119 F.3d 837 (10th Cir. 1997) 23

Anderson v. Creighton, 483 U.S. 635 (1987) 14, 19

Estate of Escobedo v. Bender, 600 F.3d 770 (7th Cir. 2010) ..... *passim*

Estate of Smith v. Marasco, 318 F.3d 497 (3d Cir. 2003) 13, 23

Graham v. Connor, 490 U.S. 386 (1989) 16, 20, 22

Gossmeyer v. McDonald, 128 F.3d 481 (7th Cir. 1997) 25

Hanes v. Zurick, 578 F.3d 491 (7th Cir. 2009) 14, 18

Holzman v. City of South Bend, 2006 WL 2788587 (N.D. Ind. Sept. 26, 2006) 23

Hope v. Pelzer, 536 U.S. 730 (2002) 13, 18, 19, 20

Johnson v. Jones, 515 U.S. 304 (1995) 2

Lyons v. Xenia, 417 F.3d 565 (6th Cir. 2005) 16

Malley v. Briggs, 475 U.S. 335 (1986) 12

Mercado v. City of Orlando, 407 F.3d 1152 (11th Cir. 2005) 22

Mitchell v. Forsyth, 474 U.S. 511 (1985) 19

Omdahl v. Lindholm, 170 F.3d 730 (7th Cir. 1999) 23

Pearson v. Callahan, ___ U.S. ___, 129 S.Ct. 808 (2009) 15, 16, 18

TABLE OF AUTHORITIES – Continued

Page

Pierson v. Ray, 386 U.S. 547 (1967) 12

Russo v. City of Cincinnati, 953 F.2d 1036 (6th Cir. 1992) 23

Saucier v. Katz, 533 U.S. 194 (2001) 15, 16, 17

United States v. Lanier, 520 U.S. 259 (1997) 18, 19, 20

Wallace v. Estate of Davies, 676 N.E.2d 422 (Ind. Ct. App. 1997) 23

Wilkinson v. Russell, 182 F.3d 89 (2d Cir. 1999) 18

Wilson v. Lane, 526 U.S. 603 (1997) 13

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV 16, 20, 22

STATUTES

18 U.S.C. § 241 19

18 U.S.C. § 242 ..... 18, 19

28 U.S.C. § 1292(b) 10

42 U.S.C. § 1983 ..... 10, 18

RULES

Sup. Ct. R. 10 21

Sup. Ct. R. 14(1)(g) 2

INTRODUCTION

The Petitioners, named defendants in this case, ask this Court to review the Seventh Circuit's disposition of their interlocutory appeal of the denial of qualified immunity. The Petition does not identify any error in the decisions from the Seventh Circuit or the district court, let alone a decision that conflicts with relevant decisions of this Court or another Circuit Court of Appeals, and it identifies no other compelling reason for granting certiorari. The Petition should be denied.

The Petitioners contend that the Seventh Circuit applied an improper summary judgment standard, which significantly lowered the plaintiff's burden. Both the Seventh Circuit and the district court faithfully applied the qualified immunity standard set forth by this Court, and both correctly rejected the Petitioners' claim of qualified immunity. The Seventh Circuit and the district court both properly held that it was clearly established that the Petitioners' entry into Escobedo's apartment, preceded by an assault with tear gas and flash-bang grenades, violated Escobedo's constitutional rights.

The Petitioners also urge this Court to grant certiorari so that the Court can provide guidance on the constitutional limitations on the use of tear gas and flash-bang grenades against barricaded, suicidal individuals. The Court should deny this request. There is no circuit split on the use of these weapons. Moreover, the Petitioners' tactics and use of these

weapons in this tragic case clearly exceeded the bounds of reasonableness, making this case a poor vehicle for the Court to provide guidance on their use in closer cases.

STATEMENT OF THE CASE

The Petitioner's recitation of the facts in their Statement of the Case, Pet. 5-10, is a verbatim reproduction of the statement of facts in their Appellate Brief before the Seventh Circuit. The Petitioner's Statement of the Case omits numerous material facts relied on by the district court and the Seventh Circuit. Specifically, Petitioners omit almost all of the facts favorable to the Respondent, the Estate of Rudy Escobedo ("Estate"). This Statement of the Case does not comply with Supreme Court Rule 14(1)(g), which requires the Petition to include "[a] concise statement of the case setting out the facts material to consideration of the questions presented[.]" Sup. Ct. R. 14(1)(g). The Petitioners do not challenge the Seventh Circuit's or the District Court's determination of the material facts at issue, which they could not do on interlocutory appeal. *Johnson v. Jones*, 515 U.S. 304, 313 (1995) (limiting interlocutory review of denial of qualified immunity to question of whether law was clearly established, and not to a "district court's determination about what factual issues are genuine") (internal quotation removed).

The Seventh Circuit discussed the relevant facts at App. 2-13.[1] The district court discussed the facts in greater detail at App. 49-84. For the convenience of the Court, a summary of the material facts as set forth by the Seventh Circuit and the district court is included below. This summary illustrates the numerous omissions in the Petitioners' recitation of the facts.

On July 19, 2005, at 4:24 a.m., Rudy Escobedo called 911 and told the dispatcher that he was armed with a gun and wanted to shoot himself, and that he was high on cocaine. App. 2-3. Escobedo asked the dispatcher to contact his psychologist, and provided a phone number. App. 3. Escobedo repeated throughout the call that while he wanted to kill himself, he had no intention of hurting anyone else, including the police. *Id.* During the call, Escobedo was delusional, at times speaking to police officers that he believed had entered his apartment. App. 51-52. Escobedo stressed that he did not want to hurt the police. App. 52. The District Court summarized Escobedo's call: "The overall tone of the call indicates that Escobedo was in despair about his drug addiction and his life in general, and that he was suicidal." App. 3, 53.

At approximately 4:55 a.m., Sergeant C.M. Taylor arrived at Escobedo's apartment building and called Escobedo via his personal cell phone from

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[1] All references to the Appendix are to the Petitioner's Appendix.

outside Escobedo's door. App. 3. Escobedo told Taylor that he was armed and planned to commit suicide. *Id.* Taylor said Escobedo sounded delusional, but did not threaten police officers or the public in any way. App. 54. At approximately 5:20 a.m., Taylor decided to contact the Crisis Response Team ("CRT"), who functioned as negotiators, and the Emergency Response Team ("ERT"), who were the tactical or SWAT team. App. 3, 50.

When the CRT and ERT arrived, Officer Bernard Ebetino of the CRT took over negotiations. App. 3. Escobedo repeated that he was suicidal and armed and again asked to speak with his psychologist and requested help for his drug addiction. App. 4. At approximately 6:23 a.m., the CRT began using a "direct link phone system," which allowed other officers to listen to the negotiations. *Id.* The direct link system should have allowed the CRT commanders (who were located on the street outside the apartment building) to listen to the negotiations, but that was not done in this case. *Id.* Instead of listening in directly, the CRT commander relied on information relayed by other CRT officers located outside Escobedo's door. *Id.* This failure to follow normal procedures resulted in the commanders on the ground not learning important information about the negotiations. *Id.*

When Ebetino began using the direct link system, he stopped using Taylor's cell phone and switched to another officer's personal cell phone. *Id.* Escobedo was not told of the change in phones or

given the new phone number. App. 56. Taylor's phone, which was the only phone that Escobedo had the number for, was not used again. App. 4, 56. Ebetino continued speaking with Escobedo for the next several hours, and Escobedo continued threatening suicide and expressing fear of being killed by the police. App. 5. Ebetino thought Escobedo was making progress at some points, while at other times was regressing. *Id.* At certain times, Ebetino thought he heard Escobedo barricading his door; at other times, Ebetino thought Escobedo was removing the barricade. *Id.* Ebetino believed that the commanders on the street were told about both the positive developments and the negative ones, but that was not always the case. *Id.* The commanders were not told about Escobedo removing the barricade and, more importantly, that Escobedo had stated that he was not going to hurt the police or anyone else but himself. App. 5, 6.

Ebetino stated that during the negotiations Escobedo did not make any statements that could be construed as threats to the public or to the officers, with one possible exception: minutes before the first tear gas assault, Escobedo said that he would come out of his apartment, but that he wanted to bring his gun. *Id.*

At one point during the negotiations, Sergeant Kevin Hunter, head of the CRT, got in touch with Escobedo's psychologist, who stated that he did not think that Escobedo had a history of using weapons or attempting suicide. *Id.* Escobedo's psychologist was not invited to the scene. App. 57.

The idea of using tear gas in an attempt to extricate Escobedo was first mentioned as early as 6:45 a.m.[2] App. 59. This was first suggested by Lieutenant Kevin Zelt, head of the ERT. App. 6. Deputy Chief Martin Bender, the overall commander of the scene, made the decision to use tear gas some time after 8:00 a.m. *Id.* Zelt gave numerous reasons for recommending the use of tear gas. Zelt stated that tear gas was "the next logical step" when negotiations are not progressing and the target is barricading and fortifying his position. App. 6. Zelt also stated that he believed Escobedo had made threats of some kind, but he could not identify a single statement Escobedo allegedly made; additionally, he may have formed this belief after the incident ended. App. 7. Zelt also stated that the decision to use tear gas was motivated by concern that the officers' readiness was deteriorating because it was hot outside. *Id.* Hunter also suggested that they decided to use tear gas to try to end the encounter out of concern for the increasing number of people who would be heading downtown during rush hour, though Zelt admitted that most people going downtown would be at work by 8:30, the commanders' deadline for using tear gas. App. 7, 64.

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[2] The Petitioners contend that the use of tear gas was not discussed until sometime around 8:00 a.m., citing the deposition testimony of Hunter. Pet. 6. However, Hunter testified that it was possible that tear gas was discussed as early as 6:45 a.m. (Doc. 37-13, p. 3), consistent with Ebetino's recollection. App. 59.

The commanders did not believe that Escobedo had committed any crime at that point, and the district court found that the only crime for which there was any evidence was possession of cocaine. App. 7, 63. Moreover, the goal was not to arrest Escobedo, but to take him into custody for a 24-hour mental health detention. App. 7.

Both the Seventh Circuit and the District Court considered the testimony of the Estate's police practices expert, Larry Danaher. Danaher opined that (1) Escobedo did not pose a threat to the officers or the public that required the use of force; (2) the decision to use force was premature and based on flawed priorities; and (3) the use of force escalated the situation and unnecessarily created a scenario that led to Escobedo's death. App. 8, 66-67.

Ebetino continued to negotiate with Escobedo after the decision to use tear gas was made. App. 8. At approximately 8:28 a.m., Escobedo told Ebetino that he would come out of the apartment, but he would bring his gun with him. *Id.* At 8:30 a.m., Escobedo told Ebetino that he was going to come out in three (3) minutes. *Id.* Ebetino asked for another three (3) minutes, but did not request any additional time after Escobedo failed to come out. *Id.* Ebetino was told to wind down the conversation with Escobedo before the deployment of tear gas, even though doing so was against normal procedures. App. 8-9. Escobedo was not told that they would soon use tear gas against him. *Id.*

While negotiations were winding down, Zelt calculated what he believed was an "incapacitating concentration" of tear gas based on the size of Escobedo's apartment. *Id.* Zelt chose six .37 millimeter liquid rounds, six .37 millimeter Sage powder, and five or ten .12 gauge munitions. App. 9. Officer Brian Martin[3] and two other ERT members fired the tear gas into Escobedo's apartment through a window. *Id.* After the tear gas was fired, the tear gas fumes forced Ebetino and the other CRT members, who had no gas masks, to leave their position outside Escobedo's door, leaving the communication equipment behind, and cutting off all communication with Escobedo. *Id.* Ending communication after chemical agents are used is against normal practice and procedure, and in this case prevented Escobedo from negotiating an end to the confrontation. *Id.*

Escobedo did attempt to contact Ebetino after the first round of tear gas, dialing the number for Taylor's cell phone three or four times. App. 10. The negotiators were no longer using that phone, and did not answer his calls. *Id.* Zelt ordered a second round of tear gas at 8:43 a.m., ten minutes after the first volley. App. 9. Escobedo again attempted to reach Ebetino by calling Taylor's phone another one or two

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[3] Petitioners incorrectly identify Officer Jason Brown, rather than Brian Martin, as being part of the tear gas assault team. Pet. 7. Respondent pointed this out to Petitioners when they made the same error in their Appellants' Brief and Amended Appellants' Brief.

times (in total making five calls), still to no avail. App. 10. The police waited another ten minutes, and then decided to send an ERT team into Escobedo's apartment to remove him. *Id.* The entry team included Officers Tim Selvia, Brian Martin, Jason Brown, Scott Straub, and others. *Id.* The entry team broke down the door and deployed a canister of "clear-out" – more tear gas. *Id.* After a few minutes, the team threw in another canister of clear-out. *Id.* Between the tear gas fired in through the window and the two canisters of clear-out, there was approximately twelve (12) times the incapacitating concentration of tear gas in Escobedo's apartment. *Id.*

The team then entered the apartment, first throwing in a flash-bang grenade. *Id.* A flash-bang grenade emits an intense light and extremely loud sound. *Id.* The flash-bang grenade ignited the propellant from one of the tear gas canisters, starting a fire in the apartment. App. 10-11. The entry team entered the apartment and extinguished the fire, then began looking for Escobedo in the main room. App. 10. The officers realized Escobedo was likely in the bedroom and tried to go in there. App. 11. Escobedo had apparently barricaded the door, so the officers forced it open. *Id.* Escobedo yelled to the officers that he had a gun to his head. *Id.* After opening the door slightly, one of the officers threw a second flash-bang grenade into the bedroom, which exploded within a foot or two of Escobedo's head. *Id.* The explosion likely rendered Escobedo temporarily blind and deaf. App. 11-12. The officers then opened the door and entered. App. 11.

Officers Martin and Brown found Escobedo sitting in the closet holding the gun in his left hand, upside down, pointed at his head. App. 11, 80. Martin asserted that he told Escobedo to drop the gun, and that he thought he saw Escobedo lower it and point it in his direction. App. 80. Officers Martin and Brown fired at Escobedo, claiming they feared for Martin's life. App. 11. Escobedo was declared dead at the scene a short time later. *Id.*

On December 20, 2005, the Estate filed a complaint in the Northern District of Indiana under 42 U.S.C. § 1983, alleging, among other things, that the Petitioners used excessive force against Escobedo when they deployed tear gas and flash-bang grenades against him. App. 12. On January 22, 2007, the Petitioners (and other defendants who are not part of this appeal) moved for summary judgment, arguing in part that they were entitled to qualified immunity. *Id.* On May 5, 2007, the district court granted the motion as to some of the claims, and denied it as to others, and denied qualified immunity for the use of tear gas and flash-bang grenades. App. 12, 45. The Petitioners challenged the denial of qualified immunity in an interlocutory appeal to the Seventh Circuit. App. 13.[4] On April 5, 2010, the Seventh Circuit

[4] The Estate filed a motion with the district court for interlocutory certification pursuant to 28 U.S.C. § 1292(b) regarding some of the claims for which the district court granted summary judgment. App. 14 n.2. The district court granted the motion and the Estate petitioned the Seventh Circuit for an interlocutory appeal. *Id.* The Estate's petition was denied, and

(Continued on following page)

affirmed. App. 1-2. The Petitioners filed a petition for rehearing and rehearing *en banc*, which was denied in an order dated May 12, 2010. App. 154. The Petitioners filed this Petition asking the Court to grant certiorari to reverse the Seventh Circuit.

REASONS FOR DENYING THE PETITION

The Petition essentially suggests two reasons for granting certiorari. First, the Petitioners argue that the Seventh Circuit strayed from this Court's precedent and lowered the standard for defeating a claim of qualified immunity. Had the Seventh Circuit applied the appropriate standard, the Petitioners contend, the Seventh Circuit should have granted qualified immunity. Second, the Petitioners suggest that the Court should grant certiorari to provide guidance to law enforcement officers on the constitutional limitations on the use of tear gas and flash-bang grenades. These are not compelling reasons to grant the Petition. The Seventh Circuit faithfully applied this Court's standards in its qualified immunity analysis, and correctly rejected the defense. There is no circuit split on the use of tear gas and flash-bang grenades that needs to be resolved. And even if this Court were interested in discussing the constitutional limitations on the use of certain non-lethal

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the Estate filed a petition for rehearing *en banc*, which was also denied. *Id.*

weapons, this case presents a poor context in which to do so. The amount of force used and the manner in which it was deployed was clearly unreasonable, so any discussion confined to the facts of this case will be of little value in cases which present a closer call.

I. The Seventh Circuit appropriately applied this Court's precedent in affirming the denial of qualified immunity.

The Petition attempts to portray the Seventh Circuit's opinion as lowering the threshold for defeating a claim of qualified immunity.[5] The alleged departure is not found in the standard the Seventh Circuit cited in its opinion, App. 14-18, which the Petitioners concede states the applicable standard. Pet. 13. The Petitioners dismiss that as "boilerplate" and contend that the Seventh Circuit "fail[ed] to apply such standards to the issues here, instead utilizing a significantly lower standard to deny qualified immunity." Pet. 13. This is incorrect, as the Seventh Circuit's qualified immunity analysis is supported by precedent from this Court.

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[5] The Petitioners contend that the Seventh Circuit applied a "constitutionally impermissible qualified immunity standard." Pet. 12. There cannot be such a thing as a "constitutionally impermissible qualified immunity standard." The defense of qualified immunity arises from the common law, not from the Constitution. *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967), *Malley v. Briggs*, 475 U.S. 335, 339-40 (1986).

The Seventh Circuit opinion speaks for itself. Although it was unable to find Seventh Circuit precedent holding this precise conduct unlawful, the court did find other sources that gave the Petitioners sufficient warning that their conduct was unlawful, including: Seventh Circuit cases presenting similar, though not identical circumstances (App. 22-23); authority from another jurisdiction presenting extraordinarily similar circumstances (App. 23-25, 31) (discussing *Estate of Smith v. Marasco*, 318 F.3d 497 (3d Cir. 2003)); authority from other jurisdictions presenting similar, though not identical circumstances (App. 25-26, 31); and dicta from Seventh Circuit cases that gave Petitioners sufficient warning that their conduct was unconstitutional (App. 28-30). This Court has held that a plaintiff need not identify an identical or even "fundamentally similar" or "materially similar" case, *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Furthermore, this Court has found it appropriate to look to the same types of sources as the Seventh Circuit utilized in determining the contours of the right alleged to have been violated. *See id.* at 742-43 (relying on factually similar though not identical controlling precedent and dicta from a case that "[gave] fair warning to [defendants] that their conduct crossed the line of what is constitutionally permissible"); *Wilson v. Lane*, 526 U.S. 603, 617 (1999) (plaintiff can overcome qualified immunity by presenting "cases of controlling authority in [its] jurisdiction at the time of the incident which clearly established the rule . . . [or] a consensus of cases of persuasive authority such that a reasonable officer

could not have believed that his actions were lawful.").

Based on its review of appropriate authority, the Seventh Circuit correctly concluded that the Petitioners were not entitled to qualified immunity. As to the use of tear gas, the court found that it was clearly established as of July 19, 2005 that the use of tear gas is unreasonable when:

> (1) attempting to subdue individuals as opposed to mass crowds; (2) when the individual does not pose an actual [immediate] threat; (3) when the individual is not holding hostages; (4) when the individual officers are not in the process of attempting to make an arrest; (5) when the individual is armed but merely suicidal as opposed to homicidal; (6) when the individual is not attempting to evade arrest or flee from the police; and (7) when the individual is incapacitated in some form.

App. 26. As to the flash-bang grenades, the court concluded that it was clearly established on July 19, 2005 that their use by Petitioners was unconstitutional. "[T]his case arises in precisely the circumstances that this Court and other circuits have sought to avoid by providing detailed guidance on when the use of flash bang devices is (and is not) appropriate under the Constitution." App. 33 (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Hanes v. Zurick*, 578 F.3d 491, 496 (7th Cir. 2009)).

The Petitioners did not have to guess whether a court might find their conduct unlawful. There was more than enough warning to tell them when and how they could appropriately use tear gas and flash-bang grenades to extricate a barricaded, suicidal individual for an emergency medical detention. There is nothing wrong with the approach taken by the Seventh Circuit or the outcome it reached.

In order to argue that there is a compelling reason to grant certiorari, the Petitioners attempt to manufacture a conflict between the Seventh Circuit decision and precedent from this Court. They accomplish this by pulling passages from the Seventh Circuit's opinions and pointing to them as examples of the "lower standard" employed by the court. Pet. 13-14. This is nothing more than obfuscation by the Petitioners. This particular trick relies on conflating the two distinct prongs of the qualified immunity test. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001) overruled on other grounds by *Pearson v. Callahan*, ___ U.S. ___, 129 S.Ct. 808, 818 (2009). The first prong of the *Saucier* test asks whether, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier*, 533 U.S. at 201. If the answer is affirmative, the second prong asks whether the right was clearly established. *Id.* The Petitioners contend that the Seventh Circuit lowered the standard for proving that a right was clearly established (prong two), but rely mainly on the Seventh Circuit's discussion of prong one.

The first two passages quoted by the Petitioners are found in a paragraph that begins, "Applying the *Graham* factors, and drawing all inferences in favor of the Estate . . . " App. 19. The *Graham* factors refer to *Graham v. Connor*, 490 U.S. 386 (1989), which is this Court's leading case on claims of excessive force under the Fourth Amendment. That these passages came in a discussion of the substantive law governing the Estate's claims (*Graham*), and use the phrase "drawing all inferences in favor of the Estate," makes it obvious that the Seventh Circuit was applying the first prong of *Saucier*.

In this case, it was not necessary for the Seventh Circuit to address *Saucier*'s first prong, as the Petitioners expressly limited their appeal to the second. *See* App. 15. However, the Seventh Circuit did address the first prong, perhaps because it was "difficult to decide whether [the] right was clearly established without deciding precisely what the constitutional right happen[ed] to be." *Pearson*, ___ U.S. ___, 129 S.Ct. at 818 (quoting *Lyons v. Xenia*, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring)). Whatever the motivation, it was within the court's prerogative to examine the first prong. It was in this context that the Seventh Circuit wrote the first two passages that the Petitioners contend are "telling" examples of the court's lowered standard. *See* Pet. 18 (quoting App. 19, 20).

The other two passages quoted by the Petitioners come in the context of prong two, but they are not problematic. These passages, which note that

Marasco put the Petitioners on notice that their conduct could be found unconstitutional, Pet. 14, use language nearly identical to *Saucier*: "[I]f a violation *could be made out* on a favorable view of the parties' submissions, the next, sequential step is to ask if the right was clearly established." *Saucier*, 533 U.S. at 201 (emphasis added). The Petitioners contend that the quoted passages represent a departure from the qualified immunity standard because they would deny immunity not only when the conduct at issue was certainly unconstitutional, but also when the conduct was only possibly unconstitutional. Pet. 16-17. The Seventh Circuit's approach is not problematic. It comes directly from *Saucier* and recognizes that because qualified immunity is to be determined before the plaintiff establishes liability, the plaintiff has not yet proven his or her version of the facts, and even if those facts are actually proven, there still remains the question of whether the force used in that situation was excessive. This Court has never suggested that qualified immunity is only defeated in cases in which the plaintiff would be entitled to a directed verdict on liability. Rather, this Court has recognized that qualified immunity can be denied when there are still questions of liability under the plaintiff's version of the facts.

The Petitioners also object to the Seventh Circuit's reliance on dicta to demonstrate that the Petitioners' use of flash-bang grenades violated clearly established law. Contrary to the Petitioner's contention, there is nothing wrong with this approach.

In *Hope*, this Court reversed the Eleventh Circuit's decision granting the defendants qualified immunity, relying in part on dicta from prior cases that put the defendants on notice that their conduct was unlawful. *Hope*, 536 U.S. at 743 ("The reasoning, though not the holding, in a case decided by the Eleventh Circuit in 1987 sent the same message to reasonable officers in that Circuit."). *See also Pearson*, ___ U.S. ___, 129 S.Ct. at 818; *Hanes*, 578 F.3d at 496 ("[L]ucid and unambiguous dicta concerning the existence of a constitutional right can without more make a right 'clearly established' for purposes of a qualified immunity analysis.") (quoting *Wilkinson v. Russell*, 182 F.3d 89, 112 (2d Cir. 1999) (Calabresi, J., concurring)). Although the court did not find any case with identical facts, it reviewed other authority, including dicta, and found ample discussion on the constitutional limits on the use of flash-bang grenades, which was sufficient to give the Petitioners clear warning that their use in this situation was unconstitutional. App. 28-33.

In another attempt to paint the Seventh Circuit's decision as contrary to Supreme Court precedent, the Petitioners cite *Hope*'s discussion of *United States v. Lanier*, 520 U.S. 259 (1997). In *Lanier*, this Court held that the "fair warning" requirement for prosecutions under 18 U.S.C. § 242 (the criminal counterpart to 42 U.S.C. § 1983) is the same as the clearly established standard for qualified immunity under § 1983. 520 U.S. at 270-71. *Lanier* did not alter the qualified immunity standard. In fact, *Lanier*'s discussion of

this standard demonstrates the propriety of the Seventh Circuit's denial of qualified immunity. In *Lanier*, this Court stated, "we have upheld convictions under § 241 or § 242 despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Id.* at 269. *See also Hope*, 536 U.S. at 741 (rejecting a requirement that previous cases be "fundamentally similar" or "materially similar").

Particularly relevant to this case is *Lanier*'s discussion of the level of specificity at which the right must be identified in prior case law:

> This is not to say, of course that the single warning standard points to a single level of specificity sufficient in every instance. In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. *See, e.g., Mitchell v. Forsyth*, [472 U.S. 511, 530-535, and n.12 (1985)]. But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful." *Anderson*, [483 U.S. at 640].

Lanier, 520 U.S. at 271. There is no doubt that the use of tear gas and flash-bang grenades by police against a barricaded, armed, suicidal individual whom the police are attempting to seize for purposes of an emergency mental health detention are analyzed under the Fourth Amendment's reasonableness standard. *Graham*, 490 U.S. at 388 ("[C]laims [that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other 'seizure' of his person] are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard[.]"). Thus, the rights at issue in this case were not required to be defined at "a very high degree of factual particularity."

For this reason, the Petitioners' continuous repetition of the particular facts of this case – that Escobedo was armed, high on cocaine, and barricaded in his apartment – does nothing to prove that they are entitled to qualified immunity. This is not, as the Petitioners suggest, a case in which the law must have been previously established "under the peculiar circumstances presented." Pet. 22. This argument is nothing more than an appeal to impose the "fundamentally similar" or "materially similar" standards rejected in *Hope*. 536 U.S. at 742 (rejecting Eleventh Circuit's materially similar standard, finding that the circuit court's grant of qualified immunity under such a standard "exposes the danger of a rigid, overreliance on factual similarity").

The Seventh Circuit looked to appropriate sources and determined that, viewing the facts in the light

most favorable to the Estate, the law was clearly established, to an appropriate degree of specificity, that the Petitioners' conduct violated Escobedo's constitutional rights. In the end, the Petitioners' argument boils down to a contention that the Seventh Circuit "misappl[ied] . . . a properly stated rule of law[,]" which is not a compelling reason for granting certiorari. Sup. Ct. R. 10. The Seventh Circuit did not misapply the qualified immunity standard and properly denied the Petitioners qualified immunity for their use of tear gas and flash-bang grenades. The Petition should be denied.

II. The Court does not need to grant certiorari to discuss the general limits on police use of specific non-lethal weapons in the absence of a circuit split, and this case would be a poor vehicle to address the constitutional limits on the use of tear gas and flash-bang grenades.

In their plea for relief, the Petitioners suggest that certiorari should be granted so that this Court can address the constitutional limitations on the use of tear gas and flash-bang grenades: "Given the significance of these two non-lethal tools within the law enforcement community, certiorari should be granted so that officers may know the bounds of their use of both of these tactics." Pet. 28. The Court should reject this request.

To begin with, this Court does not need to address every new weapon that becomes popular with

police. Since *Graham*, it has been clear that the use of any weapon in the course of a seizure is governed by the Fourth Amendment's objective reasonableness standard. The Court need not go further and write a policy manual for every weapon used by the police, unless there are compelling circumstances, such as a circuit split. The Petitioners have not identified a circuit split on the use of tear gas or flash-bang grenades.

Even assuming that it would be beneficial for the Court to discuss the constitutional limitations on these two weapons, this case is a poor vehicle for that task. The Petitioners' conduct in this case – including their tactics leading up to the deployment of tear gas, the amount of tear gas used, and the manner in which the flash-bang grenades were deployed – was clearly unreasonable. Thus, any discussion of the use of these weapons confined to the facts of this case will give police officers little guidance on their use in closer cases.

The Petitioners themselves argue that this case presents "peculiar circumstances[.]" Pet. 22. This is true, though the situation here is not unique for the reasons the Petitioners cite – that Escobedo was suicidal, armed, high on cocaine, and barricaded in an apartment. Police confront those circumstances fairly regularly, even if they are not all present together. *E.g.*, *Mercado v. City of Orlando*, 407 F.3d 1152, 1156-61 (11th Cir. 2005) (police responding to report of attempted suicide, found subject in his kitchen with telephone cord wrapped around neck and holding

knife); *Marasco*, 318 F.3d at 501-03 (police responding to call encountered mentally ill individual who suffered from post-traumatic stress disorder armed and barricaded in his home); *Omdahl v. Lindholm*, 170 F.3d 730, 731-32 (7th Cir. 1999) (police responding to call regarding suicidal fifteen-year-old armed with hunting rifle); *Allen v. Muskogee County*, 119 F.3d 837, 839 (10th Cir. 1997) (police responding to call regarding armed, suicidal man); *Russo v. City of Cincinnati*, 953 F.2d 1036, 1039-41 (6th Cir. 1992) (police attempting to seize paranoid-schizophrenic patient to return him to psychiatric institution encountered the subject armed with knives and barricaded in his sister's apartment); *Holzman v. City of South Bend*, 2006 WL 2788587, *1-2 (N.D. Ind. Sept. 26, 2006) (police responding to call regarding individual who threatened to do "suicide by cop"; subject found in his apartment which was decorated with numerous knives and swords on the walls); *Wallace v. Estate of Davies*, 676 N.E.2d 422, 424-25 (Ind. Ct. App. 1997) (police responding to call regarding suicidal man, finding him in his apartment armed with shotgun).

What does make this case unique, and thus a poor vehicle for a more general discussion of the use of tear gas and flash-bang grenades, are the following: (1) that Escobedo had threatened no one but himself; (2) that the police cut off all communication with Escobedo before deploying tear gas; (3) the amount of tear gas used; and (4) the manner in which the tear gas and flash-bang grenades were deployed.

The Seventh Circuit cited these factors as examples of how clearly unreasonable the Petitioners' use of force was.

The Seventh Circuit noted that it was unreasonable to completely cut off all lines of communication before beginning the tear gas assault. This was an unusual step to take, considering that the officers intended to use the tear gas to force Escobedo out of the apartment. Cutting off communication makes it extremely difficult, if not impossible, for the barricaded subject to surrender to the police. Thus, the Seventh Circuit stated: "The unreasonableness of the decision [to use force against Escobedo] is further exacerbated by the breakdown in communication initiated by Defendants, the lack of violent history by Escobedo (confirmed by his counselor), and the lack of any hostages or threats to the public." App. 20. A situation like this, where the police negotiate for three or four hours before abruptly ending all communication and initiating a forceful seizure (utilizing both tear gas and flash-bang grenades), is not likely to recur.

The Seventh Circuit also focused on the amount of force used and the manner in which it was deployed:

> This scenario coupled with the amount of tear gas utilized by the Defendants, twelve times the incapacitating level of tear gas necessary, the use of flash bang devices within the tear-gas filled room, and the throwing of the flash bang device into a darkened

> room with no knowledge of the location of the individual inside that room could possibly create a violation that is so patent that no violator has even attempted to obtain an appellate ruling on it.

App. 20. The court further stated:

> [O]n the facts of this case, the officers' conduct in the use of the flash bang grenades so clearly exceeded the bounds of reasonableness in the circumstances that it cannot be said to lie near the 'hazy border between excessive and acceptable force' along which qualified immunity shields officers from liability for their snap judgments, if those judgments prove to be wrong upon further reflection.

App. 33; *see also* App. 35 (Manion, J., concurring in part and dissenting in part) ("I do believe that reasonable officials would have known that using twelve times the incapacitating quantity of tear gas to extricate a person at home alone who had only threatened to harm himself and was not suspected of committing a crime 'was unconstitutional without guidance from courts.'") (quoting *Gossmeyer v. McDonald*, 128 F.3d 481, 496 (7th Cir. 1997)).

These distinguishing factors make this case a poor vehicle for a discussion on the general constitutional limitations on the use of tear gas and flash-bang grenades. The issues in this case are of little use for exploring the delicate lines between appropriate

and inappropriate use. This is not a compelling reason to grant certiorari.

CONCLUSION

The Petition should therefore be denied.

Respectfully submitted,

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